Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

October Term, 2002

Chad Barton,

Petitioner,

v.

Court of Appeals, Division I
State of Colorado

On Petition for a Writ of Certiorari
to the Court of Appeals, Division I
of the State of Colorado

PETITION FOR A WRIT OF CERTIORARI

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May 28, 2003

HOPP

QUESTION PRESENTED

In the last thirty-three (33) years, the Supreme Court of the United States has clarified due process of law with respect to burden of proof of guilt in a single criminal case. That clarification brings into question the procedures of state legislatures, which have gone unchallenged, to place conditions precedent upon a finding of not guilty that can avoid the effect of the clarified due process of law enunciated by the United States Supreme Court. The right of Colorado to prosecute the Petitioner would have ended during jury deliberations by due process of law absent an unconstitutional condition precedent employed by the state.

The Supreme Court of the United States has ruled that due process of law precludes a state from punishing a citizen unless the state proves guilt beyond a reasonable doubt. In Colorado, however, if the state has not met its burden of proof of guilt, the citizen's due process fate depends upon statutory provisions created solely by the state of Colorado. The defendant in a Colorado case must then procure a not guilty verdict by the vote of a minimum of twelve (12) jurors to assure that the citizen will not be punished by the state, a protection provided by due process of law.

The Question presented is:

Can a state, consistent with due process of law in the year 2000, impose a condition precedent upon a not guilty verdict?

Of what value is a United States Supreme Court due process declaration that prohibits punishment, if upon failure of a state to meet its burden to prove guilt, the state can, nevertheless, at that moment, circumvent that due process of law declaration by imposing a requirement of its own that may allow the prosecution to continue?

At present, a not guilty verdict rendered at the trial is the only means provided by Colorado to assure the citizen that the citizen will not be punished if the state has failed to prove its case. The conditions or absence of conditions placed upon a not guilty verdict, like the conditions for a guilty verdict, are to be judged by a due process of law standard. This standard is to be established by, and only by, the Supreme Court of the United States.

Petitioner prays that a writ of certiorari issue to open an inquiry into the validity of a Colorado condition that there must be an agreement of all twelve (12) seated jurors, before a not guilty verdict can be rendered.

The issue raised by Petitioner impacts upon the laws of every state and can affect verdicts in all criminal jury matters.

PARTIES

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Chad Barton, respectfully petitions for a writ of certiorari to review the decision of the Court of Appeals for the State of Colorado, Division I.

OPINIONS BELOW

On May 9, 2002, the Court of Appeals of the State of Colorado, Division I, filed its decision in this case, *People v. Barton*, Case number 01 CA 0215. A copy of that opinion is attached hereto as Appendix A.

Petitioner filed a petition for re-hearing in the Colorado Court of Appeals, which was denied on August 1, 2002. A copy of that order is attached hereto as Appendix B.

Petitioner filed a petition for writ of certiorari in the Colorado Supreme Court which petition was denied EN BANC on November 18, 2002. A copy of that denial is attached hereto as Appendix C.

JURISDICTION

On November 18, 2002, the Colorado Supreme Court, the highest court of the State of Colorado, denied Certiorari review to the Colorado Court of Appeals. Petitioner invokes the jurisdiction of this Court under Title 28 U.S.C. Section 1257(a).

This instant Petition for a Writ of Certiorari is filed within ninety (90) days of that order. (Rule 13)

RELEVANT CONSTITUTIONAL PROVISIONS

Fourteenth Amendment of the U.S. Constitution

RELEVANT STATUTORY PROVISIONS

Colorado Revised Statutes, 18-1-406. Right to jury trial.

> "(1) Except as otherwise provided in subsection (7) of this section, every person accused of a felony has the right to be tried by a jury of twelve whose verdict shall be unanimous..." (See Appendix E for entire text of statute)

Colorado Revised Statutes 16-10-108. Verdict.

> The verdict of the jury shall be unanimous. The jury shall return its verdict in open court, but a sealed verdict may be received as provided by rule of the Supreme Court of Colorado.

RELEVANT JURY INSTRUCTIONS

Colorado Stock Jury Instruction 38:04
(Set forth in argument text)

Colorado Stock Jury Verdict Form
(Set forth in argument text)

STATEMENT OF THE CASE

Two trials were held in this case below as the result of a partial mistrial in the first trial.

First Trial Charges:

Count I: Kidnapping Second Degree, 18-3-302(1),CLASS 2 FELONY

Count II: Robbery, 18-1-304, CLASS 4 FELONY

Count III: Aggravated Motor Vehicle Theft, First Degree-Under $15,000, 18-4-409, CLASS 4 FELONY

The first trial ended in a mistrial (Jury unable to, *as instructed,* render a 'unanimous' not guilty verdict) on Count I, Kidnapping, and a conviction of the *lesser-included charge of misdemeanor* Aggravated Motor Theft on Count III. Count II, Robbery, was dismissed by the court.

Re-Trial Charges:

Count I: Kidnapping Second Degree, 18-3-302(3),CLASS 4 FELONY

The re-trial resulted in a conviction on the above charge. Judgment of conviction was entered December 20, 2000. Defendant was sentenced that day to two years of probation conditioned upon his serving a ninety-day county jail term.

A stay of execution was granted, as was an appeal bond in the amount of $1,000.00. Defendant made the required appeal bond.

Prior to the commencement of the second trial, the Defendant moved, *inter alia*, for the trial court to declare C.R.S. 16-10-108 Verdict. unconstitutional. The trial judge denied the motion but granted leave for the Defendant to re-raise that motion in the event of a conviction.

Upon conviction, Defendant re-raised the motion, which was denied.

On May 9, 2002, the Court of Appeals of the State of Colorado, Division I, filed its decision in this case, *People v. Barton*, Case number 01 CA 0215. A copy of that opinion is attached hereto as Appendix A. Petitioner seeks review of that opinion.

STATEMENT OF FACTS

The following facts, which were developed during the trial, appear necessary to give this Court an understanding of the nature of the case. No transcript is provided in this Petition for a Writ of Certiorari and no transcript references will be employed.

The participants in the events of March 16, 1999, were two teenagers, Jonathan Marshall age 17 and Chad Barton, age 18, hereafter referred to as Marshall and Barton, who lived in a middle-income neighborhood about four and a half blocks

from each other near Englewood High School, a suburban school to Denver, Colorado, which both, Marshall and Barton, attended.

The testimony of Marshall, the alleged victim, and Barton, the Petitioner, differed in many respects. Marshall testified that Barton got into his car about 6:00 P.M. on March 16, 1999, while Marshall's car was stopped at a red light at the intersection of South Broadway and Quincy in Englewood, Colorado. Barton testified that he was headed from his rental home to his parents' house at 4400 South Huron to pickup the mail since his parents were out of town and to investigate some teenagers being inside the fence of their home. Justin Reefe testified that he had called Barton shortly after 5:00 P.M. to tell him that, while he was driving home from work, he saw some kids inside the fenced area of Barton's parents' home, the remaining renovated dwelling with out-buildings of a spacious working ranch owed by the Barton family upon which the City of Englewood subdivision was built. Marshall testified that, although he lived approximately four and a half blocks from the Barton home and attended the same high school as Barton, he had never seen Barton before, and that Barton did not have permission to enter his car. Rachael Geschwentner, an around the corner neighbor to the Barton's parents' home and a fellow student at Englewood High School, who was standing in front of Barton's rented home, testified that Mr. Barton had told her that Justin Reefe had just called him and told him that there were some kids inside the fence at his parents home. She

testified that Barton told her he was going to his parents home to check it out and pickup the mail. She testified that she recognized the car that belonged to Marshall that was pulling up at that time to the red light and told Barton that the guy driving that car would give him a ride. Barton testified to that same conversation. Barton said that he then went to the window of Marshall's car, which was stopped at the red light signal, where he told Marshall that his friend, Rachael Geschwentner, had told him that Marshall would give him a ride to his house. Marshall, according to Barton, said "Sure" and Barton got in the car. Barton said he told Marshall that he needed to go to his parents' house which was about eight blocks away. Marshall testified that Barton just said they were going for a ride to see some of his friends. Barton gave directions during the drive that took them to his parents' house, which was, in fact, eight blocks away. Marshall said he was scared during the drive because Barton initially had his right hand under his t-shirt which Marshall thought might conceal some sort of weapon. Suffice it to say, Marshall related several matters that caused him to be afraid that Barton might beat him up. Barton denied having his hand under his t-shirt and denied those other matters. Marshall testified that Barton later, during the ride, had his hand out from under his t-shirt and he did not see any weapon. Marshall further testified that Barton did not make any gestures of violence against him during the drive and made no physical or other threats against his person. The journey ended at the locked gate of the driveway to Barton's parent's home, which was some distance from the dwelling of Barton's parents.

While Barton was out of the car getting the mail from the mailbox located on the fence at the edge of the gate and surveying the yard for teenagers, Marshall exited the vehicle. Marshall testified that Barton had taken the car keys when he got out of the car at the gate but Kitty Lockwood, a passer-by, testified that the car was still running when Barton was at the mailbox and Marshall was still in the car. Barton said the keys were still in the car when he got out. When Marshall exited the car, Barton asked him where he was going and he said to his Aunt's house a few blocks away. Barton testified that he asked Marshall, as Marshall was leaving, if Marshall wasn't going to drive him back to his rental house near Quincy and Broadway like he said he would. Marshall responded in the negative. Barton then drove the vehicle back to his rental house eight blocks away, parked it in the alley parking lot beside his house and left the keys on the floorboard. Marshall retrieved the car the next morning.

Although the facts of the case were much more extensive than those given in the synopsis above, suffice it to say that Marshall said he at no time agreed to give Barton a ride and Barton said that he requested and was granted a ride by Marshall.

As noted above, the jury was unable to reach a verdict on the Kidnapping Count.

ARGUMENT SUMMARY

On appeal, the Petitioner raised an issue challenging the constitutionality of Colorado statutory provisions that involve a condition precedent. The condition precedent must be met by the jury in order to reach a not guilty verdict in Colorado. The statutory condition precedent is that the not guilty verdict must be agreed upon by a minimum of twelve (12) jurors which is the number of jurors seated in the jury panel by statute in Colorado. Colorado Revised Statutes, 18-1-406. In order to end the prosecution of the defendant, the statutorily required not guilty verdict must be rendered if the prosecution has failed to meet the state's burden of proof of guilt beyond a reasonable doubt to a minimum of twelve (12) jurors as required by state statute. Once the minimum number of jurors that must vote for conviction is set by state statute; the prosecution's burden of proof of guilt must be met to that minimum number of jurors as a requirement of due process of law.

The Barton jury deadlocked eight (8) to four (4) without stating whether the eight (8) or the four (4) was for not guilty. Regardless, clearly the state had failed to meet its burden of proof of guilt to the twelve (12) minimum jurors required by Colorado statutes. If the jury cannot reach a guilty verdict, Colorado stock jury instructions then require that the jury must render a not guilty verdict. This not guilty verdict requires a condition precedent that a minimum of twelve (12) jurors must vote for the not guilty verdict.

Petitioner asserts that the condition precedent placed upon the not guilty verdict avoids the due process consequences of the state's failure to meet the state's burden of proof for guilt. The United States Supreme Court has held that the due process consequence to the state's failure is that the state cannot punish the citizen. As such, the condition precedent requirement that a minimum of twelve (12) jurors must then vote affirmatively for a not guilty verdict is an unconstitutional violation of due process of law in the trial. The condition precedent circumvents the citizen's due process right not to be punished and vitiates the burden of proof for guilt that the United States Supreme Court has ruled to be constitutionally required in a trial. The Colorado statutory provisions, and the trial procedures relating to a not guilty verdict pursuant to that statutory scheme, violate due process of law as clarified by United States Supreme Court cases decided in the last thirty-three (33) years and should be declared unconstitutional.

REASONS FOR GRANTING THE WRIT

ARGUMENT

Appropriate Jury Verdict

The Colorado statutory requirements, and the procedural requirements pursuant to those statutes that must be met for a not guilty verdict, violate due process of law. Colorado may not set any requirement for a not guilty verdict except, logically, the negative of whatever the United States Supreme Court sets to be the due process requirement for a

guilty verdict. Illustratively stated, Petitioner submits, that to assure that due process of law is accorded to the citizen, the Colorado stock jury verdict instruction form should be changed to read:

Guilt proved beyond a reasonable doubt to a minimum of twelve (12) jurors.

Or:

Guilt not proved beyond a reasonable doubt to a minimum of twelve (12) jurors.

Clarification of Due Process of Law

Due process of law with respect to burden of proof of guilt in a single criminal case has been clarified in the last thirty-one (33) years by the Supreme Court of the United States: *In re Winship*, 397 U.S. 358; 90 S. Ct. 1068; 25 L. Ed. 2d 368; 1970 U.S. LEXIS 56; (1970) **(proof of guilt beyond a reasonable doubt is required by due process);** *Johnson v. Louisiana,* 406 U.S. 356; 92 S. Ct. 1620; 1972 U.S. LEXIS 55; 32 L. Ed. 2d 152 (1972)**(due process permits a state to statutorily set the minimum number of juror votes required for a finding of guilt);** *Burch et al. v. Louisiana,* 441 U.S. 130; 99 S. Ct. 1623; 1979 U.S. LEXIS 87; 60 L. Ed. 2d 96 (1979)**(there is a due process minimum number of juror votes required for a finding of guilt);** *Dickerson v. United States,* 530 U.S. 428; 120 S. Ct. 2326; 147 L. Ed. 2d 405; 2000 U.S. LEXIS 4305; (2000) **(a due process requirement may not be legislatively impaired).**

Minimum Number of Jurors Required to Vote for Conviction

Petitioner uses variations of the expression 'minimum number of jurors required to vote for conviction' terminology for clarification purposes in this Petition to comport with the case of *Johnson v. Louisiana, supra. Johnson* addressed a Louisiana statute that provided that in certain non-capital cases, a vote of nine (9) of the twelve (12) jurors seated in the panel, was sufficient to convict. This Court held that the Louisiana statutory scheme was in accord with due process of law so long as the state satisfied its burden of proving guilt beyond a reasonable doubt to at least nine (9) of the jurors as required by statute of Louisiana. Clearly, the Supreme Court of the United States was saying that a unanimous verdict of all jurors seated in the panel was not necessary for due process of law. More subtlety, the Court seems to have also said that due process is met if the state proves guilt to 'the minimum number of jurors set by state statute'. As an aside, irrelevant to Petitioner's case, in another case seven (7) years later, the United States Supreme Court appears to have declared that a state must set a minimum threshold of at least six (6) affirmative votes for guilt to satisfy due process of law. *Burch et. Al. v. Louisiana, supra.*

Clearly, *Johnson, supra,* did not change due process of law with respect to a guilty verdict. But it did say that if Louisiana obtained a minimum of nine (9) juror votes for guilt as proscribed by Louisiana statute, due process was satisfied. Necessarily contained within that ruling, although the United States Supreme Court did

not use the phrase 'minimum number of jurors that must be convinced beyond a reasonable doubt for a guilty verdict,' is the acceptable due process feature that a state 'may' set the number of juror votes required for a conviction subject to what we now know to be a minimum of six (6). *Burch et. Al v. Louisiana, supra.* The Court also dispelled the confusion generated use over the years of the term 'unanimous verdict', by acknowledging an unstated doctrine that: proof of guilt beyond a reasonable doubt to the minimum number of jurors set by the state satisfies due process of law. 'Unanimous' is a term involved only when the state sets the 'minimum' to be all the jurors seated in the jury panel. The 'minimum' concept as used in its varied form throughout this Petition was invented by Petitioner for the purpose of this Petition because, logically, the phrase defines a set large enough to contain a unanimous verdict of the seated panel while including all sub-sets of the seated panel that might be specified by state statute to be required for a guilty verdict. So, if a state statutorily requires, as does the State of Colorado, a 'unanimous verdict' for guilt of all of the jurors seated in the panel and the panel has twelve (12) jurors, this requirement is the equivalent of saying, 'a minimum of twelve (12) jurors must vote for a verdict of guilty'. (See Appropriate Jury Verdict, *supra.)*

The United States Supreme Court has ruled that a state may not punish a citizen if the state has not proved guilt beyond a reasonable doubt. *In re Winship, supra.* The issue raised in this Petition, <u>is not,</u> therefore, whether a state,

Colorado, may require a not guilty verdict to be found by the jury when the prosecutor cannot muster the 'minimum number of juror votes required by Colorado for a conviction'. Rather, the issue is whether Colorado can place a condition precedent upon the jury finding a not guilty verdict which can avoid the prohibition against not punishing the citizen set by the Supreme Court of the United States. Such a condition vitiates the due process requirement that there must be proof beyond a reasonable doubt of guilt found by the minimum number of jurors required by Colorado for a finding of guilt. *In re Winship, supra*; *Johnson v. Louisiana, supra.*

In Colorado, the minimum number of juror votes for proof of guilt, as demonstrated above, is twelve (12), the total number of jurors seated in the jury panel by statute. Colorado Revised Statutes, 18-1-406, *infra.* The Colorado verdict statute, 16-10-108, contains the identical requirement of 'unanimous". Colorado Revised Statutes, 16-10-108, *infra.*

Fortunately, when one employs the applicable term 'minimum number of juror votes required for guilt' instead of using the term, 'unanimous', it raises more precisely, the constitutional question raised by Petitioner. Does a unanimous vote of all twelve (12) jurors seated in the jury panel to return a not guilty verdict in Colorado, place an unconstitutional condition precedent upon the finding of not guilty after the jury irresolvably cannot find proof of guilt beyond a reasonable doubt? The Barton jury irresolvably

deadlocked 8-4 without stating whether the eight (8) or the four (4) was for not guilty. Re-stated accordingly: Does a not guilty verdict requirement that requires a minimum of twelve jurors to vote not guilty in Colorado place a condition precedent upon the finding of not guilty which violates due process of law? That question must be answered in the affirmative despite the Colorado Court of Appeals opinion, which stated, *inter alia,* that since Barton was not entitled by due process of law to a 'unanimous' not guilty verdict, Petitioner's argument on appeal must fail. (See Colorado Appeals Decision, Appendix A, App. 5)

Petitioner's position for a Writ of Certiorari is that once this irresolvable failure of proof arises in the jury room, such as the eight (8) to four (4) vote, or vice versa in order, Colorado may not vitiate the due process consequences of that failure of proof by requiring that a not guilty verdict must then be found that requires some minimum number of votes by jury members before that due process right not to be punished can be given effect. *In re Winship,supra,* and *Dickerson v. United States, supra.* That condition precedent for a not guilty verdict is an unconstitutional violation of due process of law. Colorado may not vitiate due process of law by enacting a statute that imposes a condition precedent upon that constitutional right. And Colorado may not impose a condition precedent upon that constitutional right regardless of whether Colorado requires twelve (12) or nine (9) jurors to vote for guilt.

Unanimity Is Superfluous

The term 'unanimity' as used in the Colorado Court of Appeals opinion, in actuality should be recognized as a superfluous term to the decision on appeal should this Court grant a writ of certiorari in this matter

The Colorado General Assembly chose to set the minimum number of jurors required for conviction at the same number as constituted the seated jury panel and carelessly used that popular term, 'unanimous' in Colorado Revised Statutes, 18-1-406, *infra*, and 16-10-108, *infra*. The term 'unanimous' in the Colorado statutes pertaining to a jury verdict suffices as a statute-specific word-of-art but is a non-specific choice-of-word to adequately detail the doctrine of law promulgated in *Johnson v. Louisiana, supra.* Comparatively, Louisiana chose to use more specificity by setting the minimum at nine (9) jurors for conviction although it seated twelve (12) jurors.

At any rate, Petitioner submits, the Colorado Court of Appeals was misled enough by the use of the term 'unanimous' in the Colorado statutes to hold that neither a 'unanimous' guilty verdict or a 'unanimous' not guilty verdict is required by due process of law and therefore, Petitioner could not prevail on appeal pursuant to the position outline in this Petition above. (Appendix, App. 4) But could the Colorado Court of Appeals say accurately, that Petitioner was not entitled to the affirmative vote of all twelve jurors seated in the jury panel for a vote of guilty by due

process of law? Surely not, because, a 'unanimous vote' and 'a minimum of twelve vote" are synonymous in Colorado. The position of the Colorado Court of Appeals should be reversed.

As opposed to a 'unanimous' guilty verdict, Petitioner agrees, of course, that he is not entitled to a 'unanimous' not guilty verdict by due process of law but responds that any condition precedent upon a not guilty verdict, whether the condition is the vote of one juror or a 'unanimous jury" , violates due process of law. The Colorado Court of Appeals failed to appreciate that the term 'unanimous', was not germane to the decision except to denote some form of unconstitutional condition that must be met to assure Barton that he would not be punished.

The Colorado Verdict Schemata

Colorado Revised Statutes, 16-10-108 Verdict, provides that the jury verdict shall be 'unanimous':

> The verdict of the jury shall be unanimous. The jury shall return its verdict in open court, but a sealed verdict may be received as provided by rule of the Supreme Court of Colorado.

The above statute is derived from Colorado Revised Statutes, 18-1-406 Right to jury trial, which provides for a jury panel of twelve (12) members and requires unanimity of verdict.

Colorado Revised Statutes, 18-1-406, Right to jury trial ·

> "(1) Except as otherwise provided in subsection (7) of this section, every person accused of a felony has the right to be tried by a jury of twelve whose verdict shall be unanimous..." (See Appendix E for a reading of the compete statute)

Colorado stock jury instruction 38:04, set forth below, issued by the Colorado Supreme Court, is the final instruction given in a felony case and follows the statutory scheme of the two (2) statutes, *supra*. Accordingly, this instruction provides that the jury verdict must be unanimous. The instruction also informs the jury that, regardless of the number of verdicts tendered to them in the case for one count, "...only one verdict shall be returned signed..."

38:04 FINAL CONCLUDING INSTRUCTION

The bailiff will now escort you to the jury room. Upon reaching the jury room, you are to select one of your members to be the foreman of the jury. Your foreman will preside over your deliberations and shall sign whatever verdict you reach.

The verdict must represent the considered judgment of each juror. **IN ORDER TO RETURN A VERDICT, IT IS NECESSARY THAT EACH JUROR AGREE TO IT. YOUR VERDICT MUST BE UNANIMOUS.** (emphasis added)

Only one verdict shall be returned signed [for each count] [for each defendant] [for each count, for each defendant] and it and the unsigned verdicts and these instructions shall remain in the possession of your foreman until such time as they are called for in open court. [Upon reaching a verdict you will inform the bailiff of this Court, who in turn will notify the Court, and you will remain in your jury room until called into the Courtroom.]

You will be provided with _____ forms of verdict.

(insert number)

WHEN YOU HAVE UNANIMOUSLY AGREED (emphasis added) upon your verdict(s) you will select the form(s) which reflect your verdict(s) and the foreman will sign it as the Court has stated. The unsigned form(s) shall also be returned with no markings on [it] [them].

The Colorado Stock Jury Verdict form provides both a not guilty and guilty verdict for for each count, only one of which is to be signe pursuant to the Final Concluding Instruction, *supra*, and by the footnote portion of the Jury Verdict form below:

JURY VERDICT [Count No. _____,
CHARGE OF
_____.

(insert crime charged)

People of the State of Colorado vs.

Defendant.

I.* We, the jury, find the defendant, _____, NOT GUILTY of [Count No. _____,]

(insert name)

_____.

(insert crime charged)

_____

FOREMAN

II.* We, the jury, find the defendant, _____, GUILTY of [Count No. _____,]

(insert name)

_____.

(insert crime charged)

_____

FOREMAN

*** The foreman should sign only one of the above (I or II). If the verdict is NOT GUILTY, then I. above should be signed. If the verdict is GUILTY then II. above should be signed.**

Colorado Avoids, But Should Not Be Permitted To Deny, Due Process of Law

It can be readily discerned from the above statutes and the procedural scheme devised pursuant to those statutes, that Colorado has in place a procedure that can avoid the citizen's right not to be punished if Colorado fails to prove guilt beyond a reasonable doubt in violation of due process of law. *In re Winship, supra.* If the number of jurors disposed to a not guilty verdict meets the minimum number of jurors required to render a not guilty verdict, then the due process violation is rendered harmless. The citizen is found not guilty. But if the jury remains irrevocably deadlocked, both as to a guilty and not guilty verdict, as true in the Barton case below, due process has been violated by the unconstitutional condition precedent placed upon the jury return of a not guilty verdict which the Barton jury was unable to satisfy.

Hopefully, from the argument that preceded the above statutory and procedural illustration, it can be seen that due process of law does not require a unanimous guilty verdict but does require that, if the minimum number of jurors who must vote affirmatively for a guilty verdict in a jurisdiction is not met, that due process of law

immediately kicks-in to protect the citizen. Due process of law under the Fourteenth Amendment of the United States Constitution does place the burden upon Colorado to prove guilt beyond a reasonable doubt to whatever minimum number of jurors the state requires for a guilty verdict subject to a minimum of six (6). *In re Winship, supra; Johnson v. Louisiana, supra; and Burch et al. v. Louisiana, supra.*. Petitioner was entitled by due process of law to have his guilt established in Colorado beyond a reasonable doubt whether that minimum number of jurors is called a unanimous verdict or not. At that point of failure, the Colorado legislature and Colorado Supreme Court, are powerless to impair a 'constitutional case' holding of the United States Supreme Court, *Dickerson v. United States, supra*, by creating a condition upon a not guilty verdict in Colorado which must be met before Colorado will afford the citizen the entitled due process of law protection not to be punished. The Fourteenth Amendment of the United States Constitution protects the citizen's right not to be punished.

The United States Constitution, through due process of law as defined by this Court, does not guarantee a citizen, like the Colorado Court of Appeals held, a 'unanimous' not guilty verdict. But if the state provides for a not guilty verdict, that not guilty verdict cannot be predicated upon any event other than the inability of the prosecution to muster the required minimum number of jury votes to effect a guilty verdict by proof beyond a reasonable doubt. *In re Winship, supra.* At that point, if Colorado wants to use a not guilty verdict, it must unconditionally be entered into the trial record.

Colorado Revised Statutes, 16-10-108, *supra*, and 18-1-406, *supra*, and the procedures for implementing those statutes, which require a not guilty verdict in Colorado, and require a condition precedent that must be met before a not guilty verdict may be rendered, are unconstitutional because they violate due process of law. Such a violation places a condition precedent upon the only means available in Colorado to assure that the citizen will not be punished, a not guilty verdict. If that condition precedent is not met, a re-trial unconstitutionally re-subjects the citizen to the possibility of punishment, a result prohibited by the last thirty-three (33) years of due process evolution through decisions of the Supreme Court of the United States.

CONCLUSION

Petitioner was denied due process of law because neither of the jury verdicts on the jury form were returned signed. Neither the one denoting failure to procure a guilty verdict nor the one denoting the failure to procure a not guilty verdict, was accepted by the trial court as the verdict of the jury. Due process requires that the former must be accepted as effective even when it is not returned signed by the jury. If Colorado desires a more formal statement of a finding of non-guilt, it should enter a not guilty verdict into the record automatically upon receipt of the unsigned guilty verdict. Mr. Barton should have been acquitted. Petitioner prays for the Writ to issue.

Respectfully submitted,

Robert W. Smedley

APPENDIX A

COLORADO COURT OF APPEALS

Court of Appeals No. 01CA0215
Arapahoe County District Court No. 99CR1147
Honorable John P. Leopold, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Chad Barton,

Defendant-Appellant.

JUDGMENT AND ORDER AFFIRMED

Division I
Opinion by JUDGE METZGER
Rothenberg and Kapelke, JJ., concur

May 9, 2002

Ken Salazar, Attorney General, Cheryl Hone, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

P. Arthur Tague, Denver, Colorado, for Defendant-Appellant

Defendant, Chad Barton, appeals the judgment entered on a jury verdict finding him guilty of second degree kidnapping. He specifically challenges the trial court's order denying his motion for judgment of acquittal. We affirm.

Defendant was charged with robbery, first degree aggravated motor vehicle theft, and second degree kidnapping. The robbery charge was dismissed, and a jury found defendant guilty of second degree aggravated motor vehicle theft. However, the jury was unable to agree on the kidnapping charge, and, without objection by either party, the trial court declared a mistrial. Defendant was retried on that charge, and the jury found him guilty. This appeal followed.

Defendant contends the trial court erred by ruling that § 16-10-108, C.R.S. 2001, as applied to him, did not unconstitutionally deny him due process of law as guaranteed by the Fifth and Fourteenth Amendments. We disagree.

Section 16-10-108 provides in pertinent part: "The verdict of the jury shall be unanimous."

Defendant relies on In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368, 375 (1970), which held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Then, relying on Dickerson v. United States, 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000), which held that a

judicially recognized due process requirement may not be vitiated by a legislative act, he argues that applying § 16-10-108 to require a unanimous not guilty verdict deprives him of his right to due process. He asserts that the correct application of § 16-10-108 should have resulted in an acquittal after the jury in his first trial was unable to agree unanimously that he was guilty of the kidnapping charge. We reject this argument.

It is true that due process requires a finding of guilt beyond a reasonable doubt before a defendant can be convicted of a crime. In re Winship, supra. However, the Constitution does not guarantee a defendant a unanimous verdict of either guilty or not guilty. Indeed, the Supreme Court has upheld, on due process grounds, a statutory scheme that authorized the defendant's conviction of a crime on the vote of only nine of the twelve jurors, expressly noting: "[T]his Court has never held jury unanimity to be a requisite of due process of law." Johnson v. Louisiana, 406 U.S. 356, 359, 92 S.Ct. 1620, 1623, 32 L.Ed.2d 152, 157 (1972). Therefore, defendant's due process argument must fail. See also Arizona v. Washington, 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978).

We note that, if defendant were entitled to a judgment of acquittal after the jury deadlock in the first trial, it would follow that the second trial would be barred by double jeopardy.

However, in United States v. Perez, 22 U.S. (9 Wheat.) 579, 579-80, 6 L.Ed. 165, 165 (1824), Justice Story, writing for a unanimous Court, explained that a second trial is not barred:

> The question, therefore, arises, whether the discharge of the jury by the Court from giving any verdict upon the indictment, with which they were charged, without the consent of the prisoner, is a bar to any future trial for the same offence. If it be, then he is entitled to be discharged from custody; if not, then he ought to be held in imprisonment until such trial can be had. We are of opinion, that the facts constitute no legal bar to a future trial. The prisoner has not been convicted or acquitted, and may again be put upon his defence. We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated.

This interpretation has been followed consistently by both state and federal courts. See, e.g., Richardson v. United States, 468 U.S. 317, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984); see

generally John E. Theuman, Annotation, Former Jeopardy as Bar to Retrial of Criminal Defendant After Original Trial Court's Sua Sponte Declaration of a Mistrial -- State Cases, 40 A.L.R.4th 741 (1985).

Thus, neither defendant's due process rights nor the prohibition against double jeopardy was violated in this case.

The judgment and order are affirmed.

JUDGE ROTHENBERG and JUDGE KAPELKE concur.

APPENDIX B

COLORADO COURT OF APPEALS
No. 01CA215 August 01,2002

ORDER DENYING PETITION FOR REHEARING

PEOPLE OF THE STATE OF COLORADO
V.
CHAD BARTON,
DEFENDANT-APPELLANT

APPEAL from the ARAPAHOE COUNTY
Honorable John P. LEOPOLD, Judge
No. 99CR1147

The PETITION FOR REHEARING filed in this appeal by: CHAD BARTON/ DEFENDANT-APPELLANT IS DENIED.

Issuance of the Mandate is stayed until: September 03, 2002

If a Petition for Certiorari is timely filed with the Supreme Court of Colorado, then the stay will remain in effect until disposition of the cause by that Court.

By the Court:

METZGER, J.
ROTHENBERG, J.
KAPELKE, J.

APPENDIX C

SUPREME COURT, STATE OF COLORADO
CASE NO. 02SC577
Two East Fourteenth Avenue
Denver, CO 80203

CERTIORARI TO THE COURT OF APPEALS, 01CA215, DISTRICT COURT, ARAPAHOE COUNTY, 99CR1147

Petitioner:

CHAD BARTON, V.

Respondent:

THE PEOPLE OF THE STATE OF COLORADO,

ORDER OF THE COURT

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC,
NOVEMBER 18, 2002.

APPENDIX D

TITLE 18. CRIMINAL CODE
ARTICLE 3. OFFENSES AGAINST THE PERSON
PART 3. KIDNAPPING

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

C.R.S. **18-3-302** (2002)

18-3-302. Second degree kidnapping

(1) Any person who knowingly seizes and carries any person from one place to another, without his consent and without lawful justification, commits second degree kidnapping.

(2) Any person who takes, entices, or decoys away any child not his own under the age of eighteen years with intent to keep or conceal the child from his parent or guardian or with intent to sell, trade, or barter such child for consideration commits second degree kidnapping.

(3) Second degree kidnapping is a class 2 felony if any of the following circumstances exist:

(a) The person kidnapped is a victim of a sexual assault; or

(b) The person kidnapped is a victim of a robbery.

(4) (a) Second degree kidnapping is a class 3 felony if any of the following circumstances exist:

(I) The kidnapping is accomplished with intent to sell, trade, or barter the victim for consideration; or

(II) If the kidnapping did not include sexual assault or robbery, but is accomplished by the use of a deadly weapon or any article used or fashioned in a manner to cause a person to reasonably believe that the article is a deadly weapon; or

(III) If the kidnapping is accomplished by the perpetrator representing verbally or otherwise that he or she is armed with a deadly weapon.

(b) A defendant convicted pursuant to this subsection (4) shall be sentenced by the court in accordance with the provisions of section 18-1.3-406.

(5) Second degree kidnapping is a class 4 felony, except as provided in subsections (3) and (4) of this section.

HISTORY: Source: L. 71: R&RE, p. 421, § 1.C.R.S. 1963: § 40-3-302.L. 77: Entire section R&RE, p. 961, § 13, effective July 1.L. 81: Entire section R&RE, p. 983, § 1, effective July 1.L. 86: (4) amended, p. 777, § 5, effective July 1.L. 87: (1) amended, p. 615, § 4, effective July 1.L. 89: (2) and (4) amended, p. 902, § § 1, 2, effective July 1.L. 2000: (4) amended, p. 694, § 6, effective July 1.L. 2001: (3), (4), and (5) amended, p. 857, § 2, effective July 1.L. 2002: (4)(b) amended, p. 1512, § 188, effective October 1.

APPENDIX E

TITLE 18. CRIMINAL CODE
ARTICLE 1. PROVISIONS APPLICABLE TO OFFENSES GENERALLY
PART 4. RIGHTS OF DEFENDANT

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

C.R.S. **18-1-406** (2002)

18-1-406. Right to jury trial

(1) Except as otherwise provided in subsection (7) of this section, every person accused of a felony has the right to be tried by a jury of twelve whose verdict shall be unanimous. In matters involving misdemeanors, the accused is entitled to be tried by a jury of six. In matters involving "petty offenses", the accused has the right to be tried by a jury under the terms and conditions of section 16-10-109, C.R.S.

(2) Except as to class 1 felonies, the person accused of a felony or misdemeanor may waive a trial by jury by express written instrument filed of record or by announcement in open court appearing of record.

(3) A defendant may not withdraw a voluntary and knowing waiver of trial by jury as a matter of right, but the court, in its discretion, may permit

withdrawal of the waiver prior to the commencement of the trial.

(4) Except as to class 1 felonies, the defendant in any felony or misdemeanor case may, with the approval of the court, elect, at any time before the swearing in of the jury, or after the swearing in of the jury and before verdict, with the agreement of the district attorney and the approval of the court, to be tried by a number of jurors less than the number to which he would otherwise be entitled.

(5) Upon request of the defendant in advance of the commencement of the trial, the defendant shall be furnished with a list of prospective jurors who will be subject to call in the trial.

(6) Either the district attorney or the defendant may challenge the array on the ground that there has been a material departure from the requirements of the law governing the selection of jurors, but such challenge shall be made in writing setting forth the particular grounds upon which it is based and shall be filed prior to the swearing in of the jury selected to try the case.

(7) Except as to class 1 felonies, with respect to a twelve-person jury, if the court excuses a juror for just cause after the jury has retired to consider its verdict, the court in its discretion

may allow the remaining eleven jurors to return the jury's verdict.

HISTORY: Source: L. 71: R&RE, p. 400, § 1.C.R.S. 1963: § 40-1-506.L. 72: p. 268, § 6.L. 86: (1) amended, p. 769, § 3, effective July 1.L. 91: (4) amended, p. 405, § 7, effective June 6.L. 94: (1) amended and (7) added, p. 1716, § 5, effective July 1.